

Jordan Marsh Stores Corporation and Judith Ray and Local 1445, United Food and Commercial Workers International Union, AFL-CIO. Cases 1-CA-29865, 1-CA-30041, 1-CA-31165, 1-CA-29969, 1-CA-30174, and 1-CA-30445-2

May 17, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND TRUESDALE

On January 6, 1995, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent, the General Counsel, and the Charging Party¹ filed exceptions and supporting briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions² and briefs and has decided to affirm the judge's rulings, findings,³ and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Jordan Marsh Stores Corporation, Peabody and Burlington, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 1(c).

“(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.”

¹ The Charging Party, Judith Ray, an Individual, has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² No exceptions were filed to the judge's dismissal of several 8(a)(1) allegations, including an allegedly unlawful interrogation, enforcement of the telephone usage rule, and bargaining from scratch statements.

³ The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) by terminating employee Brady, we find it unnecessary to rely on the Respondent's general opposition to union representation or to its lawful expression of that opposition in a “substantial campaign.”

With regard to the 8(a)(1) violation regarding Manager William Savage's veiled threat to employee, Marc Parent, Member Stephens finds it unnecessary to rely on the judge's observation that: “Employees need not be lawyers, parsing out every phrase to seek out permissible constructions.”

Avrom J. Herbster, Esq., for the General Counsel.
Nathan L. Kaitz, Esq. (Morgan, Brown, & Joy), for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Boston, Massachusetts, on 8 days between September 19 and 28, 1994, based on charges filed and/or amended on various dates between October 21, 1992, and April 5, 1994, by Judith Ray, an individual, and by Local 1445, United Food and Commercial Workers International Union AFL-CIO (the Union or UFCW) and complaints and amended complaints issued by the Regional Director for Region 1 of the National Labor Relations Board (the Board), on various dates between December 15, 1993, and April 20, 1994.¹ The complaints allege that Jordan Marsh Stores Corporation (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discriminatorily discharging Robert Brady and Ray and by otherwise interfering with, restraining, or coercing employees in the exercise of their statutory rights. Respondent's timely filed answers deny the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS AND THE UNIONS' LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

The Respondent, a corporation, with facilities in Peabody and Burlington, Massachusetts, is engaged in the operation of retail department stores. Annually, at each of those locations, it derives gross revenues in excess of \$500,000 and purchases and receives goods and materials valued in excess of \$50,000 directly from points located outside of the Commonwealth of Massachusetts. The complaint alleges, Respondent admits, and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the UFCW and the Retail, Wholesale and Department Store Union, AFL-CIO, CLC (RWDSU) are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Those involved

At the times relevant, the following individuals occupied the positions set opposite their names:

Judith Ray—Commission sales associate, electronics department, alleged discriminatee, Peabody.

¹ The dates on which charges and amended charges were filed and the complaints and amended complaints issued are set forth in G.C. Exh. 1(xxx).

Robert Brady—Commission sales associate, rug department, alleged discriminatee, Burlington.

Douglas Belanger—Organizing representative, UFCW.

Joseph Pennachio—Respondent's president.

Ronald Sykes—Senior vice president for human resources and selling services.

Goeffrey Brown—Director of human resources.

Sam Campagna—Store manager, Peabody.

Dal Guiliani—Director of Administration (operations manager), Peabody.

Michael Billingsley—Store manager, Burlington.

James Reardon—Divisional sales manager, Burlington.

William Briggs—Sales manager, furniture, bedding, and rugs, at Burlington through October 1993; thereafter, divisional sales manager in the Peabody store.

Jayne Mastromatteo—Group sales manager, "big ticket items," including electronics, Peabody.

William Savage—Departmental sales manager, electronics, lamps, and luggage, Peabody.

James Campbell—Security manager, Peabody.

Deborah Wilkins—Receiving and shipping department manager, Peabody.

2. Union activity

Respondent operates retail department stores at various locations in New England and elsewhere. The associates, i.e., employees, at its Boston, Massachusetts store have been represented by the Union for a number of years; the record does not reflect whether the employees at any of the other stores are similarly represented by that or any other union. There is no collective-bargaining representative in the Peabody and Burlington stores.

There has been union activity at Respondent's Peabody store since about 1990. Electronics Department Sales Associate Judith Ray had been an active participant for at least that long and, for the entire period, her union proclivities and support has been well known to her supervisors and managers. The union activity at the Burlington store began later and was conducted at a significantly lower level of activity and management denied that it was aware of either that activity or Robert Brady's alleged union propensities.

The union activity that lead to these charges began in about August 1992 with telephone calls from Ray and her husband, Richard (Rick) to Douglas Belanger, organizing representative of Local 1445, UFCW. It continued with Ray and a committee of between 15 and 20 employees distributing cards in and around the store, posting union literature and holding weekly or biweekly meetings at area restaurants and at Ray's home. Respondent was made aware of the names of those on the organizing committee through "protection" letters that the Union sent to it in October and November 1992. Those letters apprised the Employer of the ongoing campaign and warned against any reprisals that the Employer might take against those who were involved. The letters named up to 18 Peabody employees, including Ray. No such letters were sent with respect to any activity or individuals at Burlington.

The Union filed a representation petition, Case 1-RC-19898, on October 30, 1992, seeking to represent all full-time and part-time employees in the Peabody store. Pursuant to a Decision and Direction of Election that issued on January 5, 1993, an election was scheduled for February 5, 1993.

That election, however, was held in abeyance after the Union filed a blocking charge in Case 1-CA-30174. On August 5, 1993, the Union withdrew that petition.

The union activity continued, however, with Ray and other employees seeking support for the RWDSU. That union filed a petition on August 31, 1993, Case 1-RC-20033, on which a hearing was held on September 14 and 27, 1993. On December 13, 1993, a decision issued, dismissing that petition. Following a timely request for review and motion to reopen the record, however, a notice of further hearing issued, as did a May 12, 1994 supplemental decision, directing an election in an all-inclusive unit of full- and part-time employees at the Peabody store. An election was conducted on June 10, 1994. By a substantial majority (155 against and 39 for representation), the employees voted against union representation.

The Employer actively campaigned against the Unions in both campaigns. It held meetings in which groups of employees were addressed by managers at various levels and it distributed letters and other literature. As part of its campaign, it increased the numbers of managers in the Peabody store. Whenever nonemployee union organizers would enter that store, managers and security personnel would accompany them through the store, walking closely with them, even when they were walking with employees. Except as described below, its conduct during the campaign is not alleged to have been unlawful.

B. Alleged 8(a)(1) Conduct

1. Bulletin board rules—Both stores

Respondent maintains bulletin boards in the associates' cafeterias in both Peabody and Burlington. It claims that the following policy statement prohibits postings by employees, whether for union or personal business:

Bulletin boards provide a means for Jordan Marsh to communicate with Associates regarding rules, regulations, policies, procedures, and other matters of relevance to Associates.

All announcements, notices and other media posted on company bulletin boards must have the approval and authorization of the Unit Personnel Manager prior to posting. Failure of an Associate to obtain approval and authorization of the Personnel Manager may subject the Associate to disciplinary action up to and including discharge.

It is the responsibility of the Personnel Manager to periodically examine the contents of all bulletin boards and to remove all inappropriate materials.

The employees were apparently unaware of this policy statement. Respondent introduced no evidence that it had published this as a rule to them and the employee manual, "Welcome to Jordan Marsh," makes no mention of it.

Notwithstanding the policy statement, Ray and other employee witnesses (Marc Parent and Carol Sylvester) credibly testified that personal notices of all kinds were commonly posted on the bulletin board in Peabody. Those notices advertised the sale of personal property and personal services. Invitations and thank you notes were also posted. Some remained posted for weeks and months. There was no evidence

to show that those personal notices, which were posted, had been approved by the personnel manager.

In mid-October, before all personal postings were eliminated from the bulletin boards, Ray posted some union literature on the board in the Peabody store. When she observed Paul Herbert, the manager of the shoe department, removing that literature, she asked that he put it back. Herbert refused and told her that the managers had been instructed by Dal Guiliani, the store's director of administration, to remove union literature from the bulletin board whenever they saw any posted.² After speaking to Herbert, Ray photographed the bulletin board. That picture, of dubious quality, shows what purports to be a number of personal notices.

Respondent had a similar bulletin board in the associates' cafeteria in Burlington. Prior to October 1992, it was used extensively by employees for personal postings. Items posted there, Brady recalled, would remain up for 1 or 2 weeks. About October 20, he posted a piece of union literature. After 3 or 4 days, it was gone. He posted another on October 27, it was gone several days later. At that point, he said, all personal postings were removed, although they began to reappear after several weeks. He had no knowledge of being observed posting anything on the bulletin board, he did not know who had taken down his postings and nothing was said by management about limitations on use of that bulletin board.

Guiliani claimed that he checked the Peabody bulletin boards on a daily basis and would remove personal notices whenever he saw them. He denied that personal notices could have remained posted for even as much as a week or two. When he saw union postings on the board, he spoke to Ray, asking her to refrain from such postings. Their conversation was cordial and she complied with his instructions.

Peabody Store Manager Sam Campagna similarly testified that he and his senior staff would remove unauthorized matter from the bulletin board whenever such postings were observed. He denied changing the enforcement of the policy in the fall of 1992.

On November 6, Mary Ann Doran, Respondent's human resources manager, issued a memo to all general managers. In addition to directing those managers to republish the "Jordan Marsh Solicitation Policy" to all employees, it reiterated the first paragraph of the bulletin board policy as set forth above. The bulletin boards were purged of personal postings at about this time.

Contrary to the import of Respondent's contentions with respect to its bulletin board policy, I cannot read into the quoted language any broad prohibition of personal postings. At most, it requires that personal notices be approved. Even assuming, arguendo, that a posting rule so limited could be applied to prohibit employees from posting union literature, the evidence here compels me to conclude that Respondent did not require approval for personal postings or otherwise prohibit such postings on the bulletin boards in either store prior to the advent of an active union campaign. Employees posted all manner of personal notices and those notices remained posted for indefinite lengths of time.³

²Herbert did not testify and Guiliani did not dispute that he had given such instructions.

³Noting that the rule did not prohibit the posting of personal notices, but only required that they be preapproved, and further noting the more credible and mutually corroborative testimony of Ray, Par-

Employees have no statutory right to post materials on company bulletin boards. When, however, an employer permits the employees to post personal notices on such bulletin boards, either expressly or by practice, it may not discriminatorily preclude them from posting union-related materials. *Central Vermont Hospital*, 288 NLRB 514, 516 (1988); *Honeywell, Inc.*, 262 NLRB 1402 (1982). Neither may it adopt or, as in this case, attempt to adapt previously unenforced, posting rules so as to preclude such postings once union activity is observed. *Bon Marche*, 308 NLRB 184, 185 (1992); *Springfield Jewish Nursing Home*, 292 NLRB 1266, 1274 (1989).

I find that by promulgating and enforcing a previously ignored rule respecting posting so as to preclude the posting of union-related materials,⁴ by removing such materials from its bulletin boards and by directing employees not to post union literature on the bulletin boards, Respondent has violated Section 8(a)(1).⁵

2. Threats by Dupris and Savage

On October 7, 1992, Ray was sitting in the mall, outside of the bakery, with her friend, Susan Ford, the bakery supervisor. An employee, Buddy O'Rourke, and Lou Dupris, receiving manager (and an admitted supervisor and agent), approached them at about the same time. O'Rourke asked Ray how the union drive was going. Ray turned to Dupris and suggested that he might not want to remain there as they were talking about the Union. Dupris replied, "Judy, just watch out." As Ford recalled it, Dupris said, "Watch your back, Judy." Ford described Dupris' tone of voice as casual, without a "severe tone." She could not describe it as having been said "in a friendly manner." The testimony of Ford and Ray, as to this incident, is undenied; Dupris was no longer employed by Respondent at the time of this hearing and did not testify.

Regardless of the tone of his voice, what Dupris said in front of two employees conveyed the threatening message that union activities would place an employee in jeopardy. Indeed, such advice, had it come from a friend sincerely concerned for the employee's job security, might have been all the more ominous. The Board has long held such statements to be violative of Section 8(a)(1), and I am compelled to concur with respect to Dupris' threat on this occasion. *Trover Clinic*, 280 NLRB 6 fn. 1 (1986) ("keep a low profile" and "be quiet about it"); *Union National Bank*, 276 NLRB 84, 88 (1985) ("watch yourself"); *Stride Rite Corp.*, 228 NLRB 224, 230 (1977) ("watch your step"). See *Olney IGA Foodliner*, 286 NLRB 741, 748 (1987) (threats, impression

ent, Brady, D'Ambrosio, and Sylvester concerning the use of the bulletin boards, I do not credit Campagna's and Guiliani's testimony respecting their removal of such notices whenever they saw them.

⁴The nexus between the reiteration of the solicitation rules and the posting rules, in light of the active union campaign, makes clear that Doran's memo was in response to that union activity.

⁵Although there is direct evidence that Respondent removed such matter from its bulletin board only at the Peabody store, Doran's notice issued to, and was effective at, all stores, including Burlington. Because all personal notices were removed from the bulletin boards in that store at about the time she repromulgated the rule, it is reasonable to assume that they were removed by management pursuant thereto. It is not necessary that I find that specific union literature was removed by the Employer at that store.

of surveillance, and interrogation of nephew by uncle, possibly intended as “friendly advice” all deemed violative).⁶

In late October or early November 1992, Stock Supervisor Bridget Stone participated in a meeting with several stock associates and her manager, Dupris. In the course of the meeting, someone questioned whether the employees would receive their May raises if the Union prevailed. Dupris told them, “If the Union gets in, there will be no raise.”

After this meeting, Stone quizzed Store Manager Campagna about Dupris’ comment. Dupris was brought into the meeting and Campagna said that he (Campagna) did not know what would happen now that Abraham and Strauss had acquired Jordan Marsh. “Dupris,” Campagna said, may “have taken things out of context.” In this same meeting, Campagna assured Stone that employees would only be terminated for cause. Stone believes that she may then have passed Campagna’s remarks on to the other employees who had heard Dupris’ statements.

As Respondent acknowledged, Dupris’ statement was a threat violative of Section 8(a)(1). It further contends, however, that Campagna’s statements negated the coercive impact of that threat. I cannot agree. Campagna’s statement that he did not know what the new owners would do with respect to raises does not cancel out a threat that raises would be denied in the event that the union’s campaign was successful. It may even affirm the possibility of such action. The same applies to Campagna’s claim that Dupris “may have taken things out of context.” (Emphasis added.) Campagna’s reference to discharges only for cause is a non sequitur with respect to Dupris’ alleged threat. I find that there was no unambiguous repudiation of the threat, such as is required to warrant a dismissal of this allegation. *Woodlawn Cemetery*, 305 NLRB 640 fn. 1 (1991); *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).⁷

Marc Parent’s name appears on the Union’s “protection letter” sent to Respondent on November 17, 1992. Sometime thereafter, as he was leaving work, Parent was called aside by Savage and told, “I heard you signed up.” Parent asked what Savage was referring to and then made a reference to the protection letter. Savage asked, “What kind of protection do you think you’re going to get from that?” When Parent

⁶The comments attributed to allegedly friendly low-level supervisors in *Dynamics Corp. of America*, 286 NLRB 920, 927–929 (1987), cited by Respondent, were either discredited or ambiguous. The Board’s conclusion that “Be careful. They know,” in *Cartridge Actuated Devices*, 282 NLRB 426, 427 (1986), did not constitute the unlawful creation of the impression of surveillance, rested primarily on the fact that management’s knowledge of the union activity was itself a well-known fact. Member Babson dissented, asserting that the comment constituted both the creation of the impression of surveillance and a threat, notwithstanding the friendly relationship between the low-level supervisor and the employees to whom she made the comment. To the extent that the majority’s conclusion rests on the friendly relationship between the supervisor and the employees, it appears to be an aberration in a long line of contrary precedent. At any rate, the case at bar does not involve either a particularly friendly relationship between the speaker and the listener or a statement made in a jocular or especially friendly tone.

⁷As I have found other violative conduct, I must reject Respondent’s contention that Dupris’ threat was isolated. I similarly reject Respondent’s contention that a threat to deny employees their wage increases was de minimus.

replied that he could not afford to lose his job, Savage told him that the letter would give him no protection.⁸

The General Counsel alleges Savage’s comment to Parent as a veiled threat of unspecified reprisals. Respondent contends that Savage merely stated the obvious, that the letter would not insulate an employee from discharge for lawful reasons.

The test is not how Savage intended his statement but whether that statement had a reasonable tendency to interfere with, coerce, or restrain employees in the exercise of statutory rights. *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992); *Perko’s Inc.*, 236 NLRB 884 fn. 2 (1978). And, as the Supreme Court stated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969):

Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer’s rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and § 8(a)(1) and the proviso to § 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

Here, Savage’s observations were made in the context of a letter which put the Employer on notice that certain employees were engaged in union activity and expressly warned that they should not be discriminated against because of that activity. Thus, when Parent acknowledged that he had been named in a protection letter in order to protect his job, it was in the context of a fear of unlawful discrimination. For Savage to question the efficacy of such a letter is not merely to suggest that it offered no protection against lawful discipline but also to suggest that it offered no protection against union-motivated discrimination. To say that to an employee concerned about discrimination is to suggest that such discrimination is a possibility. That is a veiled threat, violative of Section 8(a)(1). Employees need not be lawyers, parsing every phrase to seek out permissible constructions.⁹

⁸Savage acknowledged that he saw that letter and that he told Parent that he knew that Parent had signed it; he did not recall whether he told Parent that the letter would not protect him. He claimed that Parent initiated the conversation. I credit Parent.

⁹*Northern Wire Corp.*, 291 NLRB 727, 728–729 (1988), and *Caterpillar Tractor Co.*, 257 NLRB 392, 396 (1981), cited by Respondent, do not require a contrary conclusion. The supervisor’s comment in *Northern Wire*, to the effect that he hoped that an employee’s attendance at a union meeting would not get that employee in trouble, was deemed vague and ambiguous because it did not specify whether the trouble would come from the employer, the union, or other employees. The statement in *Caterpillar Tractor*, that the supervisor did not think that union representation would bring employees greater job security, was a protected expression of opinion about the value of union representation.

3. Alleged interrogation, threat, disparate enforcement of telephone use rules, surveillance, and other harassment of Ray

On December 3, 1993, Ray returned from a medical leave of several weeks' duration. On her return, Michael Troia, a Braintree store sales manager who was temporarily transferred to Peabody during the union activity, asked her, "When's the union stuff going to start again?" She replied, "Back today, starts tomorrow."¹⁰

This was an innocuous query about open union activity, asked of an outspoken and known union advocate, glibly made and glibly replied to. I find, contrary to the contention of the General Counsel, that it did not interfere with the Section 7 rights of that employee or others. *Rossmore House*, 269 NLRB 1176 (1984), enf. 760 F.2d 1006 (9th Cir. 1985). Unlike the repeated interrogation of a known union adherent in *BRC Injected Rubber Products*, 311 NLRB 66, 72 (1993), Troia's query did not seek to have Ray disclose any details of the campaign or the names of any other supporters.

On that same day, Ray received her work schedule and noted that she was scheduled to work on a Sunday. She protested to William Savage, departmental manager, that she was unable to work that day. He told her that, were she under a union contract, she would have to work it. This was not true, she protested. Her schedule was subsequently corrected by the personnel department to eliminate the Sunday work requirement.¹¹

In the fall of 1992, Respondent's sales associates were entitled to a 1-hour lunchbreak and either one 20-minute or two 10-minute coffeebreaks during an 8-hour shift. Ray and Parent would take their breaks whenever they could do so without leaving the floor short handed. Ray stated that she did not have to check with anyone; Parent would let the manager know, if any manager was present.

Prior to her return on December 3, Ray had experienced no problems with her breaktimes. She did not believe that the amount of time she was taking was being monitored. On that date, however, she had occasion to ask Savage for permission to leave the floor briefly to get a can of juice; it was not her breaktime. He okayed her request. On the way, she also stopped in the ladies' room. On her return, Savage came up to her and asked what had taken her so long. She replied that she had been gone just 4 minutes. Subsequently, when she related this incident to Campagna, Campagna indicated that he was already aware of it. He told her that she should have told Savage the truth, that if she was going for juice she should have said so and if she was going to the ladies' room, she should have said that. His tone was sarcastic.

Thereafter, Ray began to notice that the various managers would check their watches when she would leave on and return from her breaks. On December 4, 1992, she returned

¹⁰Troia, who admitted that he was instructed to "try and take a pulse" on the union activity, denied that he made any such inquiry. I credit Ray over Troia in this exchange.

¹¹Ray's recollection of this statement was more credible than Savage's ambiguous denial wherein he claimed that he did not recall making such a statement and, in response to a leading question, further claimed that it was his best memory that he did not say it. He acknowledged that management had discussed the consequences of unionization, including the adoption of rules with which employees would be required to comply.

from a 20-minute break only to be accused by Savage of taking a half hour. That same day, she delayed the start of her dinner break by 10 minutes to service customers and noted the time as 4:40 p.m. when she began that break. On her return 55 minutes later, Savage again accused her of overstaying her break. He began to say that she had left at 4:30 and that "under a union contract" when she cut him off.

The practice of timing her breaks, Ray testified, continued into the fall of 1993 and was engaged in by each of her supervisors, including Divisional Sales Manager Ronnie Morris-Karembelas, Mastromatteo, and to a lesser extent by Campagna and William Briggs after he became divisional manager. This monitoring was noticed by Parent; Savage or other managers would frequently question him about her whereabouts. On one Saturday, while Ray was off the floor doing an inventory, Morris-Karembelas did so repeatedly, to the point that Parent proclaimed his annoyance with her questions.

Campagna admitted following Ray when she walked through the store with nonemployee union organizers but denied doing so at any other times or otherwise monitoring her breaks. Morris-Karembelas similarly denied monitoring Ray's activities; she would check on the coverage of the floor from time to time, without looking for Ray in particular. Savage acknowledged monitoring employee breaktimes generally, "as a matter of course of the business" in order to assure that the floor was covered. Mastromatteo, however, admitted timing Ray's breaks although her interest, she claimed, was not Ray's union activities but her own supervisory responsibilities to cover the floor when the sales associates were off the floor and to ensure compliance with the break policies. Briggs denied monitoring Ray's breaks; on occasion he would take a break with her as they were both smokers.

It is axiomatic that "work time is for work" and that employers are entitled to make sure that employees do not exceed allowed times for breaks. Nonetheless, I am persuaded that Respondent made a special effort to monitor the breaktimes of the employee it knew to be among the most active on the Union's behalf. Ray and Parent observed and accurately described management's efforts to time Ray's breaks and to keep an eye on her whereabouts. That its interest in how she utilized her time was related to her union activity is evidenced by Savage's remarks to her concerning how it would be "under a union contract." It is further evidenced by Campagna's knowledge of, and sarcastic remark about, her exchange with Savage over the time expended when she went to the ladies' room and the cafeteria for a can of juice. If she was not being watched, such an innocuous event would not have been reported to the store manager unless it warranted some discipline. Ray was neither reprimanded nor otherwise disciplined for overstaying her break, then or at any other time. This monitoring of Ray, because of her union activity, I find, was coercive and in violation of Section 8(a)(1).

There are telephones within the various departments for employees to receive calls from, or make calls to, customers, other departments, and other stores. A rule in the "Welcome to Jordan Marsh" employee handbook prohibits their personal use. Notwithstanding that rule, Ray and at least some other employees, as well as managers (to her credible observation), sometimes made personal calls on them. Ray

claimed that she did so on a regular basis, keeping her calls brief and timing them so as not to interfere with customer service. Her managers, including Savage, knew that she was making and receiving personal calls. Marc Parent testified that he had done so since he started in 1983 and that his use of the phones to call home had the approval of his manager, so long as he did not abuse the privilege. The number of Ray's calls, she acknowledged, increased after her involvement in the union activity began.

Sometime after her return from medical leave on December 3, 1992, Ray's husband, Richard, called her at work. Savage picked up the phone and told her, "No personal calls, in or out." It is unclear whether he permitted her to take this particular call. When her husband called again a day or two later, however, Savage hung up on him and told Ray, who was with a customer, that she would have to use the pay phone outside the department, notwithstanding Richard Ray's purported protestation that the call was important. At this point, Richard Ray was recuperating from his third heart attack; that fact was known to Savage and others throughout the store.

In this same period of time, Savage also told Parent that he had to stop using the departmental phone for his personal calls.

Savage essentially corroborates the foregoing testimony. His admonitions to Ray (he recalled no conversations about phone use with Parent or any other employees) he said, resulted from a nondiscriminatory application of the published rule after he noticed her increased personal use of the phones. December, he noted, is the Christmas sales season and the busiest time of the year in a retail store.

Savage's enforcement of the telephone usage rule on Ray is suspicious given the other conduct directed at her by him and department managers. She, acknowledged, however, an increased use of the departmental phones (whether that usage was related to her husband's illness or her union activity, or both), and the seasonal increase in business. In light of those, and absent some more express nexus to the union activity, I cannot find that the rules were unlawfully enforced at that time.¹²

As Ray concluded her shift on December 21, 1992, Mike Troia asked her to work a little longer. Ray told him that she could not, that she had a meeting to go to. He turned and said, "I thought your meetings were on Sunday, Judy." The union meetings were frequently scheduled for Sundays and the announcements of those meetings were openly distributed. It was no secret when and where they were held.¹³

The February 5, 1993 election was postponed due to the filing of a blocking charge. On that same day, Troia told Ray that the Union had lost and asked how she expected to get

¹² *Treanor Moving & Storage Co.*, 311 NLRB 371, 382-383 (1993), cited by the General Counsel, is distinguishable. In that case, the employer had threatened to retaliate for the union activity and had failed to support its claim of a business purpose.

¹³ Troia recalled asking her to work late one evening in December. He had no recollection of, but did not deny, the other remarks she attributed to him. He was aware that the meetings were generally held on Sundays and admitted that he may have made a comment to that effect. I find that he did.

anywhere with only 12 to 15 people attending union meetings.¹⁴ His reference to the number of attendees was correct.

This latter statement is alleged as an unlawful creation of the impression of surveillance.¹⁵ The essence of that violation is that employees reasonably assume from the statement "that their union activities have been placed under surveillance." *South Shore Hospital*, 229 NLRB 363 (1977), citing *Schrementi Bros. Inc.*, 179 NLRB 853 (1969). Respondent contends that, inasmuch as it was well known that about 12 to 15 employees had signed the "protection letters" as members of the Union's organizing committee, Troia's reference to that number would not violate the Act. Troia however was not talking about the protection letters, he referred to attendance at union meetings. There is no necessary connection between the number of employees signing such letters some months earlier and the number attending union meetings. Thus, employer expressions of how many were actually attending those meetings would give rise to a reasonable assumption of surveillance. *Gupta Permold Corp.*, 298 NLRB 1234, 1246-1247 (1988).

Respondent began to schedule employees for their breaks in mid-March 1993. On one afternoon around that time, when Ray was scheduled to take her break at 2:30, she asked Marc Parent to be sure to be in the department at that time to relieve her, because she was going to meet "some people" on her break. "Bill Savage," she recalled, "was right there when [she] said it." The people she was going to meet were the union representatives and her husband. A few minutes before 2:30, she saw her husband and the two representatives coming up the escalator, followed closely by five or six managers. Rick Ray called out to her that they would meet her in the restaurant, located on the same floor as the electronics department. Ray picked up her purse and started to go in that direction. As she began to leave, Savage said, "Hold on, Judy. I need to talk to you. I'm going to need to see you in Amy's (Amy Sexton, then the divisional manager) office. Just wait here." She asked if she could go on her break and was told to just wait, that it would not take long.

Savage was gone for about 15 minutes before he called and told Ray that it would take a while longer before they could meet. Ray repeated her request to take her break and, again, was told to continue waiting. After another half hour, her husband and the representatives left. Savage then returned and told Ray that their discussion could wait and she could take her break.¹⁶

¹⁴ Troia acknowledged speaking to Ray about the postponement of the election, commenting that he thought this signified the conclusion of the union activity. He denied making any reference to the number of people attending union meetings. Marc Parent credibly related a conversation very similar to that described by Ray, however, noting that Ray was present at the time. Given this corroboration and my overall impressions of their demeanor, I credit Ray.

¹⁵ It does not appear from either the complaint or the General Counsel's brief that the December 21 statement is similarly alleged as violative. In any event, it was well-disseminated knowledge that the union meetings were usually held on Sunday evenings. Employer reference to that fact would not likely suggest to employees that there was surveillance of those meetings.

¹⁶ Other than denying that he knew of Ray's intention to meet with the Union's representatives, and denying that he saw them come onto the floor, Savage's testimony is not inconsistent with Ray's. He

Was Savage simply imperious, rude, and thoughtless or was he harassing Ray by interfering with legitimate union activities? I am compelled to conclude that it was both. He was aware of how she intended to spend her breaktime. It would have been a simple matter, once he saw that there would be some delay before they could meet, to let her go. He chose not to, in an act so rude that it had to be intentional. It fits with the pattern of timing her breaks and other harassment to which she was subjected. I find this interference violative of Section 8(a)(1).

In early April, Ray came to the mall on her day off, accompanied by Rick and Belanger. They were sitting in the public food court when the nearby presence of several Jordan Marsh supervisors made them uncomfortable. They left in search of another restaurant where they might enjoy greater privacy, ending up by going to the public restaurant on the third floor of the Jordan Marsh store. As they entered the store from the mall, they picked up their usual "tail." Two security guards, Ann Anderson and Rose Grenier, and a manager, Ronnie Morris-Karembelas, accompanied them to the restaurant. Anderson followed them into the restaurant, sat at a nearby table within conversational distance, and told them, "Sorry guys, Ronnie's making me watch you." Belanger photographed Anderson seated near Judy and Rick. Morris-Karembelas and Grenier remained outside the restaurant. Morris-Karembelas claimed that she merely allowed Anderson to take her break at that time. Anderson credibly contradicted her and confirmed that Dal Guilliani and Morris-Karembelas "asked me to go in just to make sure there was no union activity going on."

The restaurant Ray, her husband, and Belanger chose may not have been the most secure or private place available. It was, however, a place where Ray could legitimately engage in union activity. That activity, private conversations, is not akin to such public activity as plant gate handbilling, which an employer may lawfully observe on plant or public property. *Oakwood Hospital*, 305 NLRB 680, 688 (1991), citing *Hawthorn Co.*, 166 NLRB 251 (1967), *enfd.* in pertinent part 404 F.2d 1205, 1208-1209 (8th Cir. 1969).

Had members of management or its agents come in fortuitously, Ray would have had no cause to complain, having chosen that restaurant to meet. Anderson's presence, however, was not fortuitous. She was directed to enter the restaurant with instructions to observe or prevent lawful union activity. Her presence, on orders from her superiors, the proximity to them at which she placed herself, such that she could easily speak with them in a conversational tone, and her statement as to why she was there constitute surveillance violative of Section 8(a)(1). *Farm Fresh, Inc.*, 301 NLRB 907 (1991).

claimed that he held her up because she was scheduled for a performance review to be conducted right after he spoke with Sexton. Sexton, got called away while he was consulting with her, however, holding him up for 30 to 45 minutes and was then unable to meet with Ray and Savage for the evaluation on that day. I credit Ray's testimony concerning Savage's presence when she told Parent about her scheduled meeting and when the representatives appeared on the third floor.

4. Bargaining starts from scratch—Pennachio

Respondent's president, Joseph Pennachio, held a series of meetings in November and December 1992 with groups of 12 to 15 employees in which management's opposition to the Union was expressed and the employees' need for representation was denigrated. Regional Vice President Peter Blount also attended. In the course of one meeting, Pennachio questioned why an intelligent person would want union representation. Associate Carol Sylvester replied that she sought representation because she wanted to have her benefits in writing. He replied, "That's not how it would work . . . Everything was a race as far as benefits go. That you start from zero." Sylvester had no recollection of Pennachio's discussing the mechanics of bargaining. Associate Ruthann Fitzgerald similarly recalled Pennachio saying, at another meeting, that he did not know why anyone would think that they needed a union, that "everything was negotiable, we start at zero." Accompanying that latter statement was a sweeping movement of his hand, like the clearing of a table. He also told them that both the Company and the Union had to bargain in good faith; he may have said that nothing in the law required him to agree to union proposals or make concessions.

Blount testified that what Pennachio had said was that "When you get into negotiations, every—you start from scratch. That anybody on any side can win or lose, end up with more or end up with less . . . nothing was guaranteed." I see no meaningful difference between the recollections of the employees and those of Blount.

In *BI-LO*, 303 NLRB 749, 750 (1991), the Board stated:

In evaluating comments concerning "bargaining from scratch," the Board cases draw a distinction between (1) a lawful statement that benefits could be lost through the bargaining process and (2) an unlawful threat that benefits will be taken away and the union will have to bargain to get them back.

Therein, the employer had described bargaining as being:

"like horse trading back and forth. You could win, you could lose . . . you could be the same." He also said, "It's a bargaining process, and we're going to start . . . from a clean slate. Meaning, we don't have a contract right now, so what are we starting with . . . Yes, you have these benefits, but there is no contract that we have right now to bargain from . . . you're going to be bargaining basically from nothing. You're going to be bargaining from scratch."

The Board, reversing the conclusions of the judge, concluded that the employer, by these statements, had not crossed the line and threatened to reduce employee benefits prior to bargaining. He had merely described the bargaining process to be like horse trading, stated that the employees could gain new benefits or lose existing ones, and pointed out that there was more uncertainty in bargaining for an initial contract than for successor agreements. Notwithstanding that the employer in *BI-LO* had committed numerous other unfair labor practices, it found that the "bargaining basically from nothing" statements did not threaten to strip away benefits before bargaining and did not violate the Act.

Pennachio's statements here are akin to those in *BI-LO*. His references to everything being a race is like the statements in *BI-LO* equating bargaining to horse trading and to winning or losing. There were no threats to strip away existing benefits, notwithstanding the language of bargaining from "zero" or from "scratch." His gesture, possibly akin to sweeping the table clean, was ambiguous and added no more sinister meaning to his words. I shall recommend that this allegation be dismissed.

5. Interrogation of Stone

Some time in January 1993, Project Manager Jeff Carroll asked Peabody Stock Supervisor Bridget Stone what her views and opinions were concerning the Union. His questions, she testified, made her feel "very uneasy," so she told him that she was still thinking about it. She gave him a similar answer when he repeated his question about 2 weeks later, adding that, if she were to support the Union, it would be because of "their grievance policy."¹⁷

Stone's title was "supervisor," but the parties had agreed, in the representation case, that she and others similarly situated (Deborah Wilkins before her promotion to manager and Harry Zarkades) were nonsupervisory. Indeed, after her conversation with Dupris, supra, Campagna had shown her the transcript from the representation case where the parties had agreed that she could vote. At that time, Campagna had told her that he did not believe that her vote would be challenged because they considered her a "lead stock person." "That [she said] was news to me."

Respondent now asserts that Stone was a statutory supervisor of whom such queries might appropriately be made. A determination that one is a statutory supervisor removes that individual from under the ambit of the Act's protections; for that reason, the Board places the burden of proof of supervisory status on the party alleging such status. *Health Care Corp.*, 306 NLRB 63 (1992), revd. on other grounds 114 S.Ct. 1778 (1994). See also *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). As was quoted therein:

[T]he Board has the duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect.

Westinghouse Electric Corp. v. NLRB, 424 F.2d 1151, 1158 (7th Cir. 1970), cert. denied 400 U.S. 831 (1970).

Section 2(11) of the Act defines a "supervisor" as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

As the Board noted in *Phelps Community Medical Center*, 295 NLRB 486, 489 (1989):

¹⁷ Carroll, an admitted supervisor, did not testify. Stone, no longer an employee, testified credibly and without contradiction.

The types of supervisory authority are listed in the disjunctive and authority with regard to any one is sufficient to confer supervisory status. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. den. 338 U.S. 899 (1950). However, the exercise of authority must be in conjunction with independent judgment in the employer's interest. *NLRB v. City Yellow Cab Co.*, 344 F.2d 575 (6th Cir. 1965).

The record reflects that Stone had held the title of supervisor since 1982 or 1983. She was hourly paid, at a rate about 50 percent greater than that of the stock associates. She was in charge of the soft goods end of the receiving department and directed and assigned the employees working there. She could determine where an employee would work and what work he or she would do. She would make up the work schedules, basically according to what days and hours the employees regularly worked. Employees were hired for specific shifts and hours. She could not change an employee's shift. When an employee wanted time off, she would go to her manager, Dupris, sometimes suggesting another employee to cover the absence. Sometimes, the employee asking for time off would have secured another employee to fill in. Dupris would usually go along with her suggestion. When an employee wanted time off at a time when other coverage could not be secured or every employee was needed, she might refuse the request and then go with that employee to Dupris for a final decision.

When overtime was authorized, Stone could select which employees would work. Her selection was based on the type of work that had to be done and would be made from among those employees who had indicated a willingness to work overtime. There was no seniority roster to be followed in making such assignments. She could not require an unwilling employee to work overtime; if such a situation arose, she would go to her manager or the operations manager.

Stone could tell an employee to work faster or change his assignment to other work "to make everyone happy." She also wrote up records of personnel interviews that would go into the employee's personnel file "like a little bit of a warning." She had no authority to effectively recommend discharge; any recommendation would go from her to her manager and then to the operations manager.

Stone attended meetings, held weekly or monthly depending on the season, with Guiliani, Dupris, and the other receiving department supervisors. The record does not reflect the subject of such meetings. Stock associates did not attend them.

Based on the foregoing, I must conclude that Respondent has failed to sustain its burden of proving that Stone's exercise of authority was other than routine. There was no evidence that she possessed any of the statutory attributes of supervisory authority. *Esco Corp.*, 298 NLRB 837, 839 (1990); *Hydro Conduit*, supra. Accordingly, I find that she was an employee, entitled to the Act's protections.

Respondent did not dispute Stone's testimony regarding Carroll's repeated questioning of Stone. Rather, it contended that if she were not a supervisor, the questioning was casual, general in nature, and noncoercive. I cannot agree. Stone was not a known supporter of the Union. Carroll's questioning took place in an office, with no one else present, and was of a nature to make her, and any other reasonable employee,

feel uneasy. Stone felt sufficiently uneasy that she exercised extra caution in answering him. His question of her was also repeated as the time before the election became shorter. I find that Respondent violated Section 8(a)(1) by Carroll's coercive interrogation of Stone.

C. The 8(a)(3) Allegations

1. Robert Brady

Robert Brady was a commission sales associate in the rug department in the Burlington store, having begun his employment at Jordan Marsh in 1980. He shared the sales duties for that department with one other associate, Dominic D'Ambrosio.

Brady learned of the union activity at the Peabody store and attended the organizational meetings of October 4 and 25, 1992.¹⁸ He signed the attendance roster and spoke with Belanger who advised him to be discrete in pursuing any union activity. Brady requested that Belanger include his name on a protection letter; however, no such letter was sent. Following the first meeting, he began to talk to some Burlington store employees whom he thought would be responsive and, along with two other associates, distributed some union literature and gave authorization cards to about 20 employees. He returned some signed authorization cards to Belanger. On his return from an October 12 to 19 vacation, he posted union literature on the bulletin board in the associates' cafeteria at the Burlington store. It was removed after several days, by whom he did not know, and his second posting was similarly taken down.

Brady asserted that just prior to his October vacation, he told Jim Capone, then Burlington's director of security, about the union activity taking place in Peabody and stated that "we intended . . . and hoped to do the same thing at the Burlington store." Capone professed not to recall any such conversation. In this same period of time, Brady also told Rocco Tedesci, then the alterations department manager (an admitted supervisor), of "our intention or hope" to develop a similar program of union activity. Tedesci recalled that Brady told him that the Union, which was organizing at Peabody, was making a similar effort at Burlington; he denied that Brady had said that he was involved. He also denied reporting this conversation to anyone else. Capone and Tedesci testified as Respondent's witnesses, under subpoena, as neither was still in Respondent's employ.

Respondent held meetings with the supervisory staff at Burlington once it was observed that there was union activity starting up. Management was concerned that there might be "spillover" of the Peabody activity to such nearby stores as Burlington and Braintree. At least at Peabody, the supervisors were instructed to watch out for such activity and to listen to what people were saying. Capone's principal responsibility was theft prevention. He was also expected to keep an eye out for union literature, however, and report the presence of outside union organizers.

Brady's testimony tendered to wander and was sometimes unresponsive. Nonetheless, I find that it is more persuasive

than Capone's rote and qualified answers.¹⁹ It was also no less convincing than that offered by Tedesci. I find that he did express his interest in the union activity to both of these supervisors and that one or both of them reported that activity to higher management. In so finding, I note that Brady wanted Respondent to know of his support for the Union; he asked to be included on a "protection" letter. I note, too, that neither of the only two people who recommended his discharge (discussed *infra*), Pennachio and Billingsley, testified. The unexplained absence of these high-ranking management officials, and the resulting gap in the record as to what they might have said on critical issues, warrants that an adverse inference be drawn to the effect that if they had testified truthfully here, their testimony would have been favorable to the General Counsel's case and damaging to Respondent's. *Basin Frozen Foods*, 307 NLRB 1406, 1417 (1992); *International Automated Machines*, 285 NLRB 1122-1123 (1987).

Brady and D'Ambrosio kept their work-related papers, catalogs, sales slips, and such in a four drawer file cabinet at the rear of the department. Brady also kept union-related materials in an interoffice envelope in the bottom drawer. On November 11, Brady discovered that this envelope had been opened. The union literature and materials were still there but they had been disturbed. Brady did not know who had gone into his drawer or seen those papers. Nothing was ever said to him about them.

On November 20, Brady was called to a meeting with Michael Billingsley, the Burlington store manager, James Reardon, divisional sales manager for the home store, and William Briggs, his department manager. As Brady described this discharge interview, he was told that Jordan Marsh had high standards of customer service, that there had been complaints about him from customers in the past several months and, as a result, he was being terminated. Brady questioned why the complaints had not been mentioned to him; Briggs replied, in a purportedly shamefacedly fashion, that Reardon had told him not to. Reardon, he described, did not deny it, but blushed. Brady's attitude and alleged lack of service was also discussed. He claimed that was given no specifics and shown no documentation. The termination notice that Billingsley read stated merely that Brady was terminated on that date "due to failure to comply with company job requirements and standards."

Briggs recalled that Brady was told that he was being discharged for failure to follow company procedures and because of customers' complaints. In the course of that meeting, he said, the poor maintenance in the department, its appearance, and the Company's standards were all discussed. His recollection is corroborated by both Reardon's recollection of that meeting and the notes Reardon prepared, memorializing the meeting shortly after its conclusion, which Billingsley signed. Reardon's recollection and notes also refer to Brady's failure to comply with the Company's procedures for ringing up sales on the recently installed RDS system. I find that the recollections of Briggs and Reardon are more complete than those of Brady. Briggs did not contradict Brady's claim that he had purposely not discussed the

¹⁸ All dates with respect to Brady are 1992 unless otherwise specified.

¹⁹ He repeatedly replied to questions about conversations with Brady concerning the union activity, "No, none that I recall."

customers' complaints with Brady. As noted above, Billingsley did not testify; his absence was unexplained.

In view of Brady's tenure with the Company, he was allowed to leave accompanied by Billingsley rather than by store security personnel as was usual in discharge cases. As he exited the store, Brady asked, "It wasn't really customer complaints, was it?" Billingsley said, "No" and agreed that it was something else. Billingsley did not respond further when Brady asked, "Union?"²⁰

Ronald Sykes, Respondent's senior vice president for human resources, is consulted whenever an employee with more than 10 years of service is being considered for discharge. He became involved in Brady's situation in mid-November.²¹ At that time, following a meeting of store managers, Pennachio and Billingsley asked to speak to him. Billingsley, he said, recommended that Brady be terminated because of a recent customer's complaint that Brady had refused to serve her. They also told him that there had been other customers' complaints against Brady, that Brady had refused to train a new sales associate, and that Brady had just come off of a final warning based on his performance. They asserted, generally, that Brady was not a good employee and they wanted to let him go. Sykes questioned whether these matters had been discussed with Brady, was assured that they had, and authorized the termination. Sykes denied that he had any knowledge of union activity at Burlington or by Brady at that point in time and asserted that there was no discussion of any such activity at the time the decision was made.

William Briggs, Brady's immediate supervisor, was not consulted with respect to the discharge decision and was not informed of it until just before the terminal interview. In fact, Briggs was "very surprised at the fact that we were terminating Mr. Brady." Reardon had lead him to believe that they were going to "go back with Mr. Brady once again and try to resolve the issues of the department . . . retraining him again on the systems . . . he was not grasping and . . . try to resolve once again with him the issues of the maintenance of the department, the pricing of the rugs, and all the things that we were having problems that Mr. Brady was deficient in." Reardon, the next level of supervision over Briggs, and the other participant in the discharge interview, had no role in termination procedures; he had been asked to attend that meeting solely as a witness.

There can be little dispute that Brady's supervisors were less than fully satisfied with Brady's performance before his union activity ever began. On February 6, 1991, Brady's then manager had conducted a personnel interview with him concerning three recent customers' complaints about his service.²²

On February 29, 1992, a meeting had been held among Reardon, divisional sales manager, Briggs, who had recently

²⁰I note that Brady did not mention this conversation in his pre-trial affidavit or bring it to the attention of the General Counsel until 2 weeks before trial. It is uncontradicted, however, and I do not find that Brady's failure to disclose it earlier warrants that it be discredited.

²¹He guessed that it was in the week of, or the week before, November 20.

²²Brady disputed whether he was at fault in these incidents. As these complaints arose prior to any union activity, their merits are irrelevant.

become the departmental sales manager, Brady, and D'Ambrosio. The responsibilities of the salesmen in the rug department were laid out and certain of those responsibilities were divided between Brady and D'Ambrosio. That meeting had resulted from complaints by both D'Ambrosio and Brady to the effect that the other was not doing his fair share of the work involved in maintaining the department.

On June 10, Brady received his annual performance appraisal for the year ending January 31, 1992. That appraisal included one score for his productivity and another for performance, which was made up of points for 11 factors other than sales. He earned a 91 on productivity, that is, his sales were at 91 percent of the average associate sales per hour for his department, placing him in the "good" category.²³ His performance ratings (for only 3 of the 4 quarters, due to the turnover in management staff) averaged only 38 out of 100 points. Under Respondent's evaluation system, a performance rating below 50 is treated as zero and thus his overall evaluation score was 91, in the unsatisfactory range. He was given a warning that failure to improve his performance within the next 3 months would result in disciplinary action, possibly including discharge. Under Respondent's personnel policies, an employee with Brady's tenure was entitled to a preliminary warning and reevaluation after 3 months before being put on a final warning for unsatisfactory performance. This evaluation, however, did not spell out whether it was a preliminary or final warning.²⁴ Brady was promised biweekly meetings with Briggs to help him overcome the deficiencies. No formal meetings were held, despite Brady's requests for them. Briggs claimed, however, that he spoke with Brady nearly every morning.

In about March and April, Respondent installed a new computerized sales procedure in the rug department, referred to as the RDS system. It was intended to replace the existing POS system. Brady did not like the new system. He believed that it caused a number of his orders to be lost and he complained about it. The problems with this system and Brady's use and/or failure to use it when he should have were a source of discussions between Brady and Briggs. Brady acknowledged that he had talked with Briggs about July 11 and August 22 concerning mismatched sales slips and his alleged failure to use the RDS instead of the POS system. He denied that Briggs warned him, on the latter date, that further violations could result in discharge.

In Brady's personnel jacket, which he only saw after his discharge, were "Record[s] of Personnel Interview[s]" in Briggs' handwriting, purportedly memorializing interviews on July 11 and August 22. Attached to them are what are claimed to be problem sales slips, those that were processed on the POS system rather than on the RDS system and mismatched. The records purport to detail discussions with Brady on those dates concerning his failure to use the RDS system and the latter record includes a warning of discharge for further violations of this policy. Neither was signed by Brady; they are signed by Briggs and dated November 20, 1992.

²³The appraisal form has only four rankings, unsatisfactory, good, very good, and outstanding.

²⁴There is no evidence in this record that Brady was under any warning, preliminary or final, prior to June 10.

Respondent continued to evaluate Brady in the first and second quarters of 1992. His evaluation for February, March, and April remained at the unsatisfactory level. For the second quarter, May through July, he however scored in the midrange of "good," with a productivity score of 104 and a performance score of 54, totaling 158. His associate in the department, D'Ambrosio, received unsatisfactory evaluations for both quarters. These evaluations were never discussed with Brady and he learned of them only through another employee who somehow secured a copy of the departmental evaluations for those quarters.

A satisfactory evaluation following the warning was supposed to lift the threat of discharge from over the employee's head. In late August or early September, Reardon told Briggs that they were "wiping the slate clean and starting over with Mr. Brady."²⁵ No one passed this good news on to Brady.

Respondent's third quarter for employee evaluations is August through October. Evaluations for that period should be prepared in November. No third quarter evaluation for Brady was adduced; Reardon claimed that none had been prepared.

In August, Brady heard that, under Abraham & Strauss, the new owners of Jordan Marsh, the commission rates were going to be reduced. He met with Billingsley and Briggs early that month and was told that his draw was being reduced from \$14.55 per hour to \$11.55. He met again with Billingsley and Reardon on October 7. At that time he requested an adjustment in his draw to somewhere between his then current \$11.55 and his prior \$14.55 rate. His request was denied. He was recognized, however, for high productivity in September and was twice commended by Billingsley for exceptional sales days in October. For the month of October, his sales per hour averaged 160 percent of the zone sales per hour; he completely wiped out his commission deficit and earned almost \$600 in commissions over his draw and that deficit.

In October, a third salesman, Peter Hennessey, was hired for the rug department. He completed his preliminary training and began to work regularly on the floor in November. His presence was resented by both Brady and D'Ambrosio. They feared that he would cut into their earnings and they told him so around November 10. At that time, Brady let Hennessey know that he would get no help at all from Brady. D'Ambrosio told Hennessey that he would get no help, at least with respect to the merchandise. They were never told to help or train Hennessey, although Brady acknowledged that under normal circumstances, he would help a new employee.

Around the time of the conversation with Hennessey, Brady also had a conversation with Mary Silverman, a furniture department sales employee. Silverman had complained to Reardon that Brady was transferring calls from his department to hers. Brady asked her why she had complained and explained that it was not him, but the operator, who was transferring these calls. Brady's conversation with her had been provoked by her complaint to Reardon.

On November 14, Brady and D'Ambrosio met with Billingsley, at their request. They complained about the addi-

tion of a third salesperson to the rug department, problems with lost orders, missed delivery dates and the RDS system, the need for additional telephones in the department, problems related to the stockroom, and the numbers and sizes of rugs on the floor. At the end of this meeting, Billingsley promised to take the problems under advisement and complimented Brady on his productivity. Nothing was said about any concerns with Brady's performance.

Later that same day, Billingsley caught up with Brady as Brady was proceeding up the escalator. Billingsley expressed his appreciation for the fact that Brady and D'Ambrosio had brought the department's problems to his attention. He told Brady, "You know, Bob, you older guys are the backbone of the Company . . . you know the systems, you know the rugs, you know your products, you know the customers, you know everything. If we didn't have you we would have a difficult time."

According to Reardon, one of the problems referred to in the discharge interview was customers' complaints about Brady. He testified that he had received 10 to 15 complaints involving Brady over the course of the year. He testified as to personal knowledge of only one, an October 31 complaint from a customer who had purchased a rug from Brady. He described a second, allegedly made on November 14, of which he only had knowledge from seeing a "Report of Interview" form in Brady's personnel folder. He did not discuss most of the complaints with Brady; allegedly, he passed them on to Briggs if he could not resolve them himself. Some of them involved problems with deliveries.

The October 31 complaint was initially reported to a different divisional sales manager and was referred to Reardon. It involved the customer's allegation that after the purchase they had experienced delays in delivery and when they spoke with Brady felt that he was "disinterested" and unwilling to help them. The customer, he said, referred to Brady as "rude," although Reardon did not refer to that comment when he made notes of his conversations with the customer.

Reardon discussed this customer's complaint with Brady and Brady denied its validity, stating that there was nothing that he was able to do about the order. Brady also denied that he had been rude to the customer.

The alleged November 14 incident involves the claim of a customer that, when he asked Brady for assistance with a carpet, was told, "It's over there" with Brady motioning to another area of the floor. The report, written by Billingsley, appears to have initially recorded the date as "11/24." The "2" is scratched out and the date changed to "11/14." The original report was not dated, either under "Date of Interview" at the top or under "Dated" at the bottom. A subsequent copy is dated "11/24/92" at the top. It was never discussed with Brady.

Briggs testified that customers' complaints about salespeople are common in the store. He had heard complaints about Brady and about D'Ambrosio. None of those complaints was ever made in writing. Other employees have been the subject of written complaints; the record does not reflect what, if any, discipline they received.

When Brady got access to his personnel jacket on November 24, he found a number of documents, on the forms used as records of personnel interviews, which he had never been shown or seen before. Included therein were the records of purported interviews dated July 11 and August 22, which

²⁵To the extent that Reardon's testimony, to the effect that Brady was not removed from under this warning due to an oversight, conflicts with the testimony of Briggs which is set forth above, I credit Briggs.

were signed and dated by Briggs on November 20, as discussed above. In addition, there were three other interview records, all purporting to document interviews of November 10 between Briggs and Brady and concerning Brady's alleged failure to maintain the department, his transferring of phone calls, and his refusal to help the new employee. They were all signed by Briggs on November 20. Briggs contended that he had written these out, without recording a date under "Date of Interview" or signing and dating them at the bottom, and kept them in his desk drawer. After Brady was discharged, Briggs was asked for anything he had with respect to Brady. Purportedly, he produced these from his desk, in their unsigned and undated state, and was told to date and sign them. He then inserted the date of the interviews as November 10 and signed and dated them as of November 20. The same was true for the records of interviews dated July 11 and August 22. Briggs testified that the alleged records of November 10 interviews did not rise to the level of discipline, which is why he had not shown them to Brady for his signature or placed them in Brady's personnel file.²⁶

Brady's personnel jacket also contained a record of interview, signed by Billingsley. One copy of that record is blank under "Date of Interview"; the second has a date of November 24, 1992, in that space. It relates an alleged failure to process one of Brady's orders, reported to Billingsley on November 24.

2. Judith Ray

Judith Ray began her selling career at Jordan Marsh in December 1983. She was a salesperson in the electronics department in the Peabody store and, since 1991, had been paid on commission against a draw. Marc Parent was another commission sales associate in electronics. Luciana Fuller was a new employee in October and November; at least with respect to the electronics department. She was also paid on commission.

On November 8, 1993,²⁷ Ray sold a 32-inch Sony TV set to Dias. At 5 percent, her commission on this \$1000 set was \$50. The stock book on the floor showed three in stock. She sent Dias to the receiving department to pick up the set. After Dias left the sales floor, someone in receiving called and told Ray that there was no stock on that item to satisfy either the sale to Dias or a similar sale she had made earlier. She lost the first sale. Ray told Briggs that she was going down to receiving to check the stock for herself and asked him to watch the floor.

As Ray described the events, she searched the stockroom where such large sets would normally be held, without success. She then spotted one in the area in front of the doors from the dock, near Wilkins' office. Ray called this area "the return area" because it was where merchandise returned to the store by a commercial trucking company would be dropped. Returned merchandise, she said, particularly if

²⁶That the alleged record of interview of August 22 was not shown to Brady supports Brady's contention that he was not threatened with discharge on that date. Had he been so warned, he would have been shown the report of interview and been offered a chance to sign it. Had it been prepared on that date, with such a warning, he would have seen it. That he did not persuade me that this record was created after the fact, to bolster the Employer's justification for discharge.

²⁷All dates hereinafter are 1993 unless otherwise specified.

large, would not remain there for long because it would be blocking that passageway. She examined the box, found that it had been opened, and that the tape had been cut and pulled up slightly, the flaps which close the top of the box were uneven, not lined up, and the box was "a little beat-up, like it had gone through shipping." She looked inside the box and saw that the plastic covering around the set had been crinkled but the styrofoam packing material was in place. She saw neither a sold sticker such as either the stockroom or the warehouse would have affixed to the box or evidence that such a sticker had ever been on that box.

Ray observed paperwork in the clear plastic envelope on the outside of the box. That paperwork showed that the set had been sold to a customer named Smith and had come from the warehouse. The presence of warehouse paperwork on a set could indicate that it had been sold and was awaiting pickup by the customer, particularly if the set was unopened. What paperwork on an open set might indicate was subject to greater controversy. Ray testified that paperwork might remain on a set that a trucking company had brought back from a customer for several days before it was sent back to the department for a credit. Bridget Stone, a lead associate in receiving, testified that paperwork on a box that was opened and had the tape peeled off would indicate that it was a return. Marc Parent, Ray's coworker, testified that paperwork on a set would raise a question for him as to whether or not he could sell it. If he found such a set that he needed for a sale, he would contact the other salesperson to see if the set was available to sell. Campagna, who had little direct involvement in receiving, thought that it would be unlikely, but not impossible, that a returned set would have paperwork on it. Under usual conditions, the paperwork from a returned set would be brought to the department by the customer or sent to the sales floor by receiving personnel some time after receipt so that a credit could be issued.

Ray asked Wilkins when the set had come in to the warehouse. She then returned to the department to check the log-book of customers' special orders. She found no record for this set at that time.²⁸ Wilkins checked her log, and when Ray returned to receiving, held up that log for Ray to see, stating that it had come in about mid-October.

Based on the location and condition of the merchandise and the extended period from when it had originally arrived in receiving, Ray concluded, without asking Wilkins when the set had gone out of, or come back into, receiving, that the set was a very recent return. Because it appeared to her to have been taken out of the box, she requested, and Briggs authorized, an additional 10-percent discount to Dias if he would accept this set. Ray denied, contrary to Wilkin's testimony, that Wilkins had told her that the set was not a return. Wilkins did not tell Ray that she could not sell that set to another customer. Ray, Wilkins said, told her that the TV was "set to sell."²⁹ Ray offered the set to Dias with the added discount and he accepted it. She then wrote a credit

²⁸A copy of the log, showing Smith's special order, was shown to her on November 26, in the discharge interview.

²⁹Ray had no recollection of saying this to Wilkins. I credit Wilkin's recollection that tends to explain why Wilkins did not prevent Ray from selling the set or report that Ray had done so.

on the initial sale and rewrote it at \$899, reducing her commission by \$5. Dias took the TV set.³⁰

After the set left the receiving department, Wilkins noted on the manifest, which had shown the arrival of that set for customer Smith, that Ray had sold the set to another customer. She retained a copy of the sales slip. She did not report this purportedly strange or unusual situation to any of her superiors.

Ray took the paperwork off of the box and put it in her book, where she kept pertinent papers. She retained it, she said, to make sure that a credit was written and in case there was ever a question about the set. That paperwork included the name of the customer and the number of the person who had made the sale. Ray did not recognize the number and, she said, assumed that the sale had been made by a contingent sales associate or by a salesperson in another store. The number was, in fact, that of Luciana Fuller, who was on sick leave when Ray sold the set. Ray did not initiate a credit to Smith or check to see if one had issued.

On the evening of the sale, Ray told Briggs that the stock count was off with respect to three Sony 32-inch TV sets. She spoke with Mastromatteo on the following day, Tuesday, November 9. At that time, Ray told her about the problems with the count, her sale on Monday of two 32-inch Sony TVs, her loss of one sale, and her delivery to Dias of a returned open set that she had found. There was no further discussion at that time.

Mastromatteo asserted that she had been in the stockroom on November 5 and had seen a 32-inch Sony of the same model. The set, which she placed some distance from where Ray claimed to have found the one she sold to Dias, was in a box resealed with clear tape, not the original brown tape. That box, she said, had paperwork and the large (10 inch by 10 inch) warehouse sold sticker on the side. She did not examine the paperwork but recalled that the name "Smith" was on the sold sticker.³¹

Mastromatteo reported the shortage to Guiliani, suggesting a possible theft. Guiliani did some checking, found that there

³⁰Dias essentially confirmed Ray's description of the events. His description of the condition of the box was similar (but not identical) to hers. To him, "it obviously looked like it had been pulled out of the package." He described the box as appearing to have been dropped, with one flap torn off, no tape on the top, and with styrofoam that been removed and broken. He saw no plastic wrapping around the set. He accepted that set with the assurance that he could return it if it was not in working order and only after looking it over as best he could without unpacking it to see that it was not gouged or scratched. Dias was a witness for the General Counsel. Respondent did not seek him out, either in its investigation of this matter or to testify here, because Company policy discourages involving customers in personnel matters.

³¹Mastromatteo testified that she asked Ray, at that juncture, whether there had been paperwork on the box and was told that there had not. She did not mention this in either of the first two statements she gave the Employer before Ray was terminated, only mentioning it in a statement given after the discharge. Given its potential significance, I cannot accept Mastromatteo's claim that this was a mere oversight. Had Mastromatteo claimed, before the discharge, that Ray had told her this, some mention of this would have been made in the discharge interview. I credit Ray.

were no thefts but that Mastromatteo's count had been off. He verbally reprimanded her for making the mistake.³²

On November 15, Smith called and asked Mastromatteo whether the set was in. She checked the logbook, saw that it had come in, and double checked with receiving. At this point, she said, Wilkins told her that this was the set that Ray had sold to Dias. Mastromatteo instructed Ray to check with the warehouse and other stores to determine if there was additional stock. There was not and Mastromatteo instructed Ray to call Smith, explain that there had been a problem, and offer to substitute an available but higher priced set.³³

Ray called Smith and got the customer's approval to credit the prior sale and write a new sale for the higher priced set (at the original price). She did so, using Fuller's number on the credit and her own on the sales slip.³⁴ A week or so later, Smith canceled this order.

Mastromatteo began to suspect that there was a problem with the sale Ray had made after talking with Wilkins and reported the situation to Briggs. Geoffrey Brown was brought in and an investigation was conducted with statements being written out by Wilkins, Mastromatteo, and Briggs.

Wilkins wrote out one statement at Briggs' request. It states that Ray sold a Sony TV that had warehouse paperwork on it, identifying it as a set sold to Smith. It further states that Ray removed that paperwork and secured a \$100 discount for the customer on the basis that the set was opened but that Wilkins did not see whether it was opened or not.³⁵

Briggs wrote a statement on November 19. It relates Ray's complaint that on November 8, she had sold two sets that were supposed to be in stock but were not, causing her to lose the sale on the first one. As to the second, it describes her request to go to the stockroom to look for herself and her call to Briggs wherein she stated that she had found a set but that it was in an open box. According to this statement Ray asked permission to give the customer a 10-percent discount and, when Briggs inquired, explained that such a discount was the policy of the Peabody store.

³²Guiliani's testimony, based largely on the statement he wrote out after Ray was discharged is inconsistent with the testimony of Mastromatteo, Zarkades, Wilkins, and Campagna. It cannot be credited.

³³Here, as in her earlier conversation with Ray, Mastromatteo claimed that Ray had denied taking the paperwork off the set. She also claimed that Wilkins had told her that Ray had done so. These contentions conflict with the statement Mastromatteo wrote out respecting the events of November 15 and with Wilkin's testimony and statement. I do not credit Mastromatteo with respect to these contentions.

³⁴Ray claimed that she had intended to take the credit against her own sales number and that she believed, even after she was shown the documents, that she had done so. In order to use Fuller's number, Ray would have had to consult some other document, possibly the original pink slip, which she still had in her box.

³⁵At Brown's request, she gave a second statement that amplified this first statement. In that second statement she denied that she had given Ray permission to sell it, denied that she had told Ray that it was a return, denied that there was an area in receiving known as the return area, and asserted that, if the set had been a return, it would not have had paperwork on it. This statement is undated; from the matters it denies, which are responsive to what Campagna and Brown perceived to be Ray's defenses on November 26, in particular stating that there was no "return area," I conclude that this statement was prepared after the discharge.

In Mastromatteo's two statements of November 22, she related that she had seen and "looked closely" at a TV set in UPS room in the receiving department on November 5, observing that the box had been opened and resealed but did not otherwise appear to have been tampered with. That set, she wrote, had a sold tag on it and paperwork indicating that it was for a customer named Smith.³⁶ In a second statement given the same day, she described the events of November 15, i.e., the call from Smith, Wilkins' statement that Ray had sold the set to another customer, and her instructions to Ray respecting substitution of another set. There was no reference to Ray removing the paperwork or denying that there had been paperwork on the set. In that statement, Mastromatteo noted that she had authorized Ray to use her own commission number because (she apparently thought) the original sale had been made by a noncommission contingent employee and Ray was doing the "leg-work" to correct the situation.³⁷

On November 26, Ray was called to the office where she was confronted by Brown, Campagna, and Briggs. Campagna said that they had a serious situation at hand and questioned her concerning the events of November 8. She was accused of removing the paperwork from an already sold set and selling that set to another customer, to her advantage, depriving another commission sales associate of her commission. Ray understood the accusation to be that she had destroyed the paperwork and denied that. She maintained that she found the set in the return area, described the box as having been opened and in some disarray, using her hands in an upward movement to indicate that the top was opened and the stuffing was coming out of the box. She claimed that she checked her book upstairs to see whether there was any record of it as having been sold to another customer and asserted that Wilkins had told her that the set had come in several weeks earlier. She told them that she had concluded from all of the circumstances that the set was a returned item that she was free to sell. She acknowledged that she had removed the paperwork and retained it in her box upstairs. She offered to produce that paperwork and insisted that Mastromatteo and Wilkins could support her claims.

Campagna and Brown left the meeting and called Wilkins. They asked her whether she had told Ray that the set was a return, whether the set was in the return area, and whether the box was opened. Wilkins told them that she had not said it was a return, claimed that she had told Ray that it belonged to a customer and showed her the manifest, and asserted that, while the tape might have been cut, the box was not opened as far as she was concerned.

³⁶ Initially, Mastromatteo testified that when she first saw that set in the UPS room, she had not taken notice of the customer's name on that paperwork. On cross-examination, she testified that she had seen a large green label (the warehouse sold sticker) on the box with the customer's name, "Smith" on it.

³⁷ At the request of Brown or Campagna, Mastromatteo wrote out a third statement on November 27, after Ray's discharge, purporting to detail the presence of paperwork on the set, Wilkins' statement that Ray had removed it and Ray's claim that there had been no paperwork. She testified that, even though she suspected Ray of wrongdoing when she wrote out the first two statements, that her failure to include these details was simply an oversight. As noted above, I have discredited that aspect of her testimony.

Campagna and Brown then called Ronald Sykes, to secure his approval for Ray's termination. They recommended discharge on the basis that Ray had accepted a commission that was inappropriate, on a fraudulent claim because the merchandise had already been sold to another customer, that she had deprived another associate of an earned commission and had secured an unwarranted discount for the customer. Sykes agreed³⁸ and Brown and Campagna then prepared the termination papers. They merely stated that Ray was being terminated for "violation of Company policy."³⁹ Notwithstanding (or perhaps because of the fact) that Ray was a known leading union advocate and the RWDSU petition was still pending before the Regional Director), there was no discussion of her union activity.

While Campagna and Brown were talking with Sykes, Wilkins questioned Harry Zarkades, the other lead receiving associate, about the condition of the box in question on November 8. He recalled that the box was closed and indicated that he was willing to give a statement to that effect. Wilkins ran up to the office and told Brown and Campagna as they were preparing to go back into the meeting.

On their return, Ray refused to discuss the matter further, insisting that they either return her to work or terminate her. They discharged her and Briggs escorted her from the store.⁴⁰

After the discharge, statements were written by Zarkades and Dan Ingram, a receiving associate. In his statement, as in his testimony before me, Zarkades stated that the box was closed and not disturbed or damaged. He described it as having warehouse paperwork on the box and a warehouse sold sticker. To him, it was obviously not a return and he testified that he told Ray this. Ingram wrote that he saw the box and, to his observation, it was not opened and was marked as a warehouse order. He also testified that it was not where Ray says she found it. He further claimed, in that statement, that Wilkins never authorized Ray to sell that TV. It must be noted that no one ever claimed that she did and Ingram acknowledged, in his testimony, that he had no personal knowledge of communications between Ray and Wilkins. Both of these witnesses, and particularly Ingram, placed their observations of the "closed" TV set at times which were somewhat inconsistent with the events related by other witnesses. I place little weight on their testimony, accepting

³⁸ Brown and Campagna denied that any decision had been made before this meeting; Briggs and Mastromatteo had no knowledge of any decision to fire Ray prior to the meeting. James Campbell, head of security for the Peabody store, testified however that several days prior to November 26, he was told by his regional investigator that the latter had heard that the Company was going to discharge Ray for mishandling a sale. The source of his information, I find, is too remote to warrant a conclusion that a final decision had been made before November 26.

³⁹ Ray believed that these papers had been prepared before the meeting ever began. I cannot find that they were.

⁴⁰ Ray asserted, and Briggs denied, that Briggs physically pushed her out the door when they arrived at the exit. She filed a criminal complaint against him about this; that complaint was dismissed. Animosity at this juncture, if it existed, could as well be explained by the contentious nature of the discharge interview and comments Ray made to Briggs as they went down the escalator (refusing to ride with him in the elevator), as by any union animus. Noting that Campbell corroborated Briggs, I credit Briggs' description of these terminal events.

only that Wilkins related Zarkades' observations to Campagna and Brown after Sykes had approved the discharge but before Ray was informed of that decision.

Ray's conduct, Campagna testified, violated rules 1 and 14 of the "Company Standards" section of its employee handbook. Those rules provide for "serious disciplinary action, up to and including termination" for "giving . . . merchandise . . . at a reduced charge" and for "[s]ubmitting a fraudulent claim for reimbursement or compensation of any kind." Fraud, Sykes testified, consisted of conduct that was intentional, not simply mistaken.

Discharges of its associates, while not undertaken lightly, are not uncommon in Respondent's operations. Brown testified that he had been involved in 30 to 50 discharges since 1990. It was his practice, he said, to refer to prior cases to make sure that discipline was assessed consistently. He called Ray's case an unusual situation and could not point to an exactly similar incident. Evidence of other discharges, in various situations, was adduced.

For example, one employee was discharged in September 1991 for misleading the supervisor so as to get a lower price on a TV set for his father. The salesperson who rang up that sale was discharged for using another employee's number on the transaction, notwithstanding that she reported this infraction herself when she realized that she had done something wrong. In December 1991, an employee was discharged for taking a promotional item, i.e., an item of nominal value given away with the sale of something else, after the promotion was over, without securing permission to do so. In March 1992, an associate was discharged for abusing the customer allowance policy by taking repeated discounts on items she had purchased as the prices came down. In April 1992, one employee was discharged for providing free meals to a group of maintenance employees; those employees who accepted the free meals were also discharged. Employees have also been discharged for misuse of their discount privileges.

Particularly relevant to the instant case were the following: In January and September 1993, employees were discharged for fraudulent commission transactions. They entered different sales persons' numbers in writing credits, shifting the loss of commissions to other employees.

In December 1993, after Ray was discharged, another employee was discharged for misleading her supervisor in order to obtain a discount for a customer. In the same month, an employee in the rug department had canceled another employee's sale and sold a rug under his own number. That employee was discharged and, in deciding on termination, reference was made to Ray's discharge as similar conduct.

Notwithstanding the foregoing, Ray and fellow sales associate Marc Parent recalled incidents when Parent had unknowingly sold TV sets that she had previously sold. On the one occasion in September 1993, Ray said, she brought this to the attention of Dominic DeStevens, then a sales manager in rugs and electronics. He authorized her to substitute the next model up, which she did to everyone's satisfaction. DeStevens had no recollection of this incident. On cross-examination, Ray was shown a sales slip for a 31-inch RCA TV, dated September 1, at 4:05 p.m., with her sales number. She identified that slip as the one involved in this sale. Parent was shown another sales slip for an identical set, sold by him earlier on that same date. He was unable to identify it

as the sale involved in either of the incidents he recalled when he had sold TVs which Ray had already sold. Although these records do not disprove the claims of Ray and Parent with respect to sales people inadvertently selling previously sold merchandise, no records definitively showing such transactions were produced. I conclude, based on the credible testimony of Ray and Parent, that on one or two occasions, Parent did sell merchandise that Ray had already sold. When that happened, it was inadvertent and, since Parent testified that he would not sell merchandise that had paperwork on it without checking with the original salesperson, his error may have been caused by the absence of such paperwork on the sets he sold. The instances described by Parent are, thus, not entirely comparable to Ray's sale of the set to Dias.

Ray's performance, either the positive for which she had been commended, or the negative for which she had been counseled, was not a factor in her discharge.

3. Analysis

a. Analytical mode

Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), provides the analytical mode for resolving discrimination cases turning on the employer's motivation. Under that test, the General Counsel must first:

make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once accomplished, the burden shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. [Citations omitted.]

Fluor Daniel, Inc., 304 NLRB 970 (1991).

A prima facie case is made out when the General Counsel establishes union activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement that has the effect of encouraging or discouraging union activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence. Evidence of suspicious timing, false reasons given in defense, and the failure to adequately investigate alleged misconduct all support such inferences. *Adco Electric*, 307 NLRB 1113, 1128 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *Asociacion Hospital Del Maestro*, 291 NLRB 198, 204 (1988); *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988).

Once the General Counsel has made out a prima facie case, the burden shifts back to the Respondent. That burden requires:

Respondent to establish its *Wright Line* defense only by a preponderance of the evidence. The Respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it.

Merrilat Industries, 307 NLRB 1301, 1303 (1992).

b. *Robert Brady*

I am satisfied that the General Counsel has established the requisite prima facie case with respect to Brady. Respondent was strongly opposed to union representation of its employees and expressed that opposition in a substantial campaign. It was also possessed of animus toward union activity; which it expressed in unfair labor practices at both stores, although more widely at the Peabody store. Those unfair labor practices took place contemporaneously with and subsequent to Brady's discharge.

Brady was involved in the inception of union activity at the Burlington store and, as I have found, his activity was known to management.⁴¹ It is essentially irrelevant that Sykes, who made the ultimate decision on discharge, denied knowledge of Brady's union activities. What is at issue is whether, as I have found, the individuals who recommended his discharge knew of and were motivated by them. *Babcock & Wilcox Construction Co.*, 288 NLRB 620, 641 (1988); *Boston Mutual Life Insurance Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982), enfg. 259 NLRB 1270 (1982). As the court therein stated:

[W]e are reluctant to adopt a rule that would permit the company to launder the "bad" motives of certain of its supervisors by forwarding a dispassionate report to a neutral superior.

Finally, in this respect, it cannot be denied that the discharge of one of the initiators of the union activity would tend to discourage continued union activity. *Stoody Co.*, 312 NLRB 1175 (1993).

The burden thus shifts to Respondent to establish that it would have discharged Brady even if he had engaged in no union activity. I am compelled to conclude that it has failed to sustain that burden and/or to further conclude that the reasons it has asserted for Brady's discharge are pretextual. Thus, I note again the failure of Respondent to adduce the testimony of Pennachio and Billingsley, the two managers who recommended that discharge. As the administrative law judge stated in *Basin Frozen Foods*, supra:

[T]he Respondent's failure to call [those managers who had allegedly reported the conduct warranting discharge] is damning—their absence from the stand invites an inference adverse to the Respondent, that their testimony would have undermined the defense under—

⁴¹ Even absent my conclusion of knowledge based on credibility observations and the failure of those who recommended his discharge to testify, knowledge of Brady's union involvement may be inferred from the pretextual nature of the reasons asserted for his discharge. *Basin Frozen Foods*, infra at fn. 1, citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). In particular, I note the effort to build a file of adverse personnel interviews and reprimands after his discharge.

taken by [the manager who made the discharge decision].

Moreover, the rationale Pennachio and Billingsley allegedly offered to Sykes for Brady's discharge was misleading, at best, and substantially false, taken in its worst light. According to Sykes, they reported that Brady had just come off of a final warning based on his performance. This was untrue; under the Employer's own policies, the warning was preliminary, not final. Additionally, Brady had not "just come off" that warning; he had improved his performance and the slate had been wiped clean as of August. The November customer's complaint (assuming that it was actually made and Billingsley's ambiguous dating of the record of that complaint note puts that in some doubt) was a common, run-of-the-mill complaint that did not rise to the level of a refusal to serve a customer. Complaints about salespersons are frequently received in the store, and there was no evidence proffered that complaints such as this one warranted discipline, let alone discharge, in the past. Even a series of three more serious complaints made against Brady in 1991 had resulted only in a warning. Pennachio and Billingsley also mislead Sykes by telling him, in response to his question, that all of the matters they reported had been discussed with Brady. In fact, the uncontradicted evidence is that Respondent purposely refrained from discussing the customers' complaints with him.

One of the matters allegedly reported to Sykes was Brady's refusal to help train Hennessey. Not only was this not discussed with Brady before his discharge, it was never mentioned in the discharge interview. Further, Brady was not alone in his refusal to help Hennessey. D'Ambrosio had similarly refused, albeit not as unqualifiedly as did Brady. As far as this record shows, D'Ambrosio was neither discharged nor otherwise disciplined.⁴² In this regard, it should be noted that, like Brady, D'Ambrosio had been the subject of customers' complaints. He had also been evaluated as unsatisfactory for the first two quarters of 1992, February through July.

Additionally pointing to pretext are the following: the discharge was recommended by the president of this large, multistore enterprise, an unusual event in any such organization, and the store manager; his immediate supervisor and the manager above that one were not involved in the decision. His immediate supervisor had been lead to believe that Brady would be counseled and was taken aback by the discharge. And finally, when Brady asked Billingsley, as he was exiting the facility, whether he was being discharged because of customers' complaints, Billingsley acknowledged that he was not and did not respond when asked if the Union was the real reason.

Based on all of the foregoing, I conclude that Respondent has failed to rebut, with credible evidence, the General Counsel's prima facie case. I find that the discharge of Robert Brady was motivated by his union activity, would not have

⁴² The record reflects that when Luciana Fuller was a new employee in the electronics department in October 1993, she complained that Ray had refused to help train her. This was discussed with Ray, but there is no evidence that Ray was disciplined for her refusal. Thus, the reference to the refusal to train Hennessey also indicates disparate treatment as does the failure to discipline D'Ambrosio for similar conduct.

occurred if he had not been so engaged, and violated Section 8(a)(3) of the Act.

c. *Judith Ray*

The same analytical mode applies to the discharge of Judith Ray. Here, given the extent of her union activity, Respondent's animus, and her discharge while a representation petition was pending, the General Counsel has made out a strong prima facie case that her protected activity was a motivating factor in her discharge.

To rebut that prima facie case and show that Ray would have been discharged for the same conduct even in the absence of her union activity, Respondent must only show that it reasonably believed that she had engaged in misconduct of a level warranting termination. *GHR Energy Corp.*, 294 NLRB 1011, 1012-1013 (1989). The question is, "What did they know and when did they know it?"

The evidence in Respondent's possession at the point of discharge consisted of written statements by Mastromatteo, Wilkins, and Briggs; Wilkins' oral statements on November 26; and Ray's acknowledgments on that same date.

To reiterate that evidence: from its own managers, Respondent had learned that the TV set was in a sealed, if perhaps previously open, box, bearing paperwork indicating that it had been sold to a customer named Smith. It learned that Ray had removed that paperwork and sold that set to another customer. In doing so, they were told, Ray had told Briggs that the set was in an open box and had secured a discount of 10 percent for her customer. Before the decision to discharge Ray was made, they were told that Wilkins was 95-percent sure that it was not a return, that the box was not in disarray, and that, while Wilkins could not say if the tape had been cut, it was not opened.⁴³ Ray confirmed for them that she had removed the paperwork and held it in her book but contradicted Wilkin's description of the condition and location of the set.

The foregoing, I find, is sufficient to satisfy Respondent's burden here. The evidence which it had at the critical time,⁴⁴ as detailed above, could reasonably lead this Employer to conclude, as it asserted that it had, that Ray fraudulently (i.e., intentionally) claimed a commission by selling a set that had already been sold and also secured a discount to which the customer was not entitled. These are grounds, under Respondent's policies, for discipline, including discharge. The Respondent has also shown that it has little or no tolerance for misconduct that involves matters of trust and honesty. It has discharged employees for infractions involving very little money, even where the employee has voluntarily come forward and admitted the conduct. It has discharged employees for conduct similar to that which Ray appeared to have engaged in.

Could Respondent have conducted a more thorough investigation, particularly by interviewing the customer? Yes, it

⁴³ Campagna and Brown also recall Wilkins' denying that she gave Ray permission to sell the set. There is no indication that Ray ever told them that she had. Campagna recalls Wilkins' saying that there was no return area in the stockroom and describing the location of the TV differently than did Ray. It is likely that they asked her about the return area; it is unlikely that they asked her whether she had given Ray permission to sell the disputed TV.

⁴⁴ I find it unnecessary to consider the evidence that came into Respondent's possession after the discharge.

could have. Would that have changed its mind with respect to discharge? Possibly, but it still would have been faced with the contrary statements of its supervisors concerning the condition of the set, the fact that it was not a return, and Ray's admission that she took and held the paperwork. In any event, as stated in *Merrilat Industries*, the existence of some contrary evidence would not have necessarily negated its defense. Moreover, I believe that the reasonableness of Respondent's policy of not involving customers in its personnel matters is a business judgment outside the Board's realm to evaluate.

The burden thus shifts once again to the General Counsel to show that Respondent's defense is pretextual. It can show that by demonstrating that the Employer's reasons are false or that the employee was subjected to disparate treatment. Neither has been shown here. Thus, while I accept that Ray, in good faith, made a hasty, albeit erroneous, decision, it cannot be said that Respondent erred in concluding that the set belonged to a customer and that Ray had improperly removed the paperwork. Neither can it be said, given the circumstances, that its conclusions that she had done so, and had secured the discount, intentionally, was unreasonable. Nor can I find that she was treated differently from other disciplined employees. Several of the incidents leading to the discharge of others were quite similar to the incidents here. The incidents to which Ray and Parent allude of Parent selling sets that she had previously sold, on the other hand, are distinguishable in that they could not have involved the paperwork that was involved in this situation, given Parent's credible testimony.

It is true that, as I have found, Ray was subject to some harassment by the Employer because of her union activity. That may indicate that Respondent was not unhappy with the prospect of terminating her. I cannot find, however, that it created the situation leading to her discharge, falsified evidence to support that discharge,⁴⁵ or treated her disparately from others they had discharged.

Accordingly, I find that the General Counsel has failed to establish that Respondent's discharge of Judith Ray violated Section 8(a)(3) and (1) of the Act. I shall recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. By disparately promulgating and enforcing rules prohibiting the posting of union literature on its bulletin boards, by threatening employees with discharge, loss of wage increases, and other unspecified reprisals, by interrogating employees about their union activities or interests, by engaging in or creating the impression of surveillance of employee union activities, and by otherwise harassing employees because of their union activities, the Respondent has engaged in unfair labor practices affecting commerce within the

⁴⁵ The statements taken after Ray's discharge, while somewhat slanted toward supporting or sustaining that discharge, are not so biased or wrong as to necessarily suggest pretext. That the pre-discharge statements are somewhat incomplete or amateurish and lack the labor relations expert's sophisticated touch, on the other hand, tends to support the argument that Respondent launched a legitimate investigation of her conduct once it came to light and not one pre-disposed to find her at fault.

meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging an employee because of his union activity, the Respondent has violated Section 8(a)(3) and (1) of the Act.

3. Respondent has not violated the Act in any manner not specifically found here.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁶

ORDER

The Respondent, Jordan Marsh Stores Corporation, Peabody and Burlington, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disparately promulgating and enforcing rules prohibiting the posting of union literature on its bulletin boards, threatening employees with discharge, loss of wage increases, and other unspecified reprisals, interrogating employees about their union activities or interests, engaging in or creating the impression of surveillance of employee union activities, and otherwise harassing employees because of their union activities.

(b) Discharging or otherwise discriminating against any employee for supporting Local 1445, United Food and Commercial Workers International Union, AFL-CIO, the Retail, Wholesale and Department Store Union, AFL-CIO, CLC, or any other union.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Robert Brady immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has

⁴⁶If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

been done and that the discharge will not be used against him in any way.

(c) Post at its facilities in Peabody and Burlington, Massachusetts, copies of the attached notice marked "Appendix."⁴⁷ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

⁴⁷If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT disparately promulgate and enforce rules prohibiting the posting of union literature on our bulletin boards.

WE WILL NOT threaten employees with discharge, loss of wage increases, or other unspecified reprisals in order to discourage them from engaging in any union or other protected activities.

WE WILL NOT interrogate employees about their union activities or interests.

WE WILL NOT engage in surveillance, or create the impression of surveillance, of employee union activities.

WE WILL NOT otherwise harass employees because of their union activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 1445, United Food and Commercial Workers International Union, AFL-CIO, the Re-

tail, Wholesale and Department Store Union, AFL-CIO, CLC, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Robert Brady immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed

and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify Robert Brady that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

JORDAN MARSH STORES CORPORATION